IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 476 OF 1996

Waman Kashinath Sontakke ..Appellant
Vs.
Ananda Gunda Kapare and Ors. ..Respondents

Mrs. Anjali Helekar for Appellant.
Mr. P.D. Dalvi for respondent nos.1 to 4 and 6 to 8.

CORAM: B.H. MARLAPALLE, J.

Date : April 12, 2007.

P.C.:

1. Heard Mrs. Helekar the learned counsel for the appellant who was the plaintiff in Regular Civil Suit No. 79 of 1979. The said suit was filed for partition and declaration of the suit land located in Survey No.315 (Gat No.1251) admeasuring 8 H. 38 R. and Survey No.316 (Gat No.1252) admeasuring 1 H. 84 R. of village Kodoli, Taluka Panhala in Kolhapur District.

2. Kashinath Sontakke, the original landlord, had five sons, namely, Giridhar, Gopal, Narhar, Laxman and Waman. Narhar died and after his demise on or about

4/4/1971 Kashinath Sontakke partitioned his agricultural lands amongst all his five sons. Defendant Nos.9 and 10 were the LRs of late Narhar. However, by the said partition deed the land in Survey Nos.315 and 316 was partitioned only amongst three brothers, namely, Gopal, Narhar and Waman and the respective heirs are as under:-

(a)	Gopal	-	6 Acres 30 Gunthas
(b)	Waman	-	10 Acres 30 Gunthas
(c)	Narhar represented by his son Ashok (deft.No.9)	-	9 Acres 10 Gunthas

. At the same time, part of the said land admeasuring 1 acre and 8 gunthas was retained as a common land because in the said patch of land there was a well located and electric motor for irrigation was also there. Gopal alienated his share of 6 acres 30 gunthas by way of registered sale deed in favour of defendant nos.1 to 3. The plaintiff approached the trial court with a grievance that the defendant nos.1 to 8 were disturbing his possession over the common land retained as 1 acre and 8 gunthas and, therefore,

he prayed for a permanent injunction. In the said suit he also prayed for partition of his share admeasuring 10 acres 30 gunthas in continuity from the northern side on the basis of the map that he had annexed to the plaint. On appreciation of evidence both the documentary and oral as adduced by the parties before the trial court, it held that the plaintiff had not properly described and identified the suit property, he could not prove that he was in lawful possession of the entire suit property, no cause of action arose to file the suit, there was no encroachment, as alleged, by the defendants and consequently the plaintiff was not entitled for any relief or for the possession of the encroached land. Being dis-satisfied with the Judgment and Decree in RCS No. 79 of 1979 rendered on 29/4/1989, the plaintiff filed Regular Civil Appeal No. 206 of 1989 and the same has been partly allowed by the learned Vth Additional District Judge, Kolhapur. This decree passed by the Lower Appellate court has not been challenged by any of the defendants, but the plaintiff still claimed to be aggrieved by the same and, therefore, this second appeal. The operative part of

the decree passed by the Lower Appellate Court reads as under:-

(a) It is declared that plaintiff is owner and in possession of 10 acres 30 gunthas land out of the suit lands from northern side.

(b) It is also declared that plaintiff has 1/3rd share in common land admeasuring 1 acre and 8 gunthas, wells therein, electric motor installed thereon and trees in the said land.

(c) Defendant nos.1 to 8 have 1/3rd share and defendant nos.9 and 10 have 1/3rd share in the said common property.

(d) Plaintiff is entitled for partition of the said common property i.e. land admeasuring 1 acre 8 gunthas, trees therein, wells therein and electric motor installed thereon and entitled for separate possession of his share.

3. Mr. Dalvi the learned counsel for the

defendant nos.1 to 8 has placed before me a copy of the plaint and it is clear that all the prayers, except one, as set out therein, have been granted in favour of the plaintiff by the Lower Appellate Court. All that the Lower Appellate Court has refused is the relief regarding the location of 1/3rd share of the plaintiff in the common land admeasuring 1 acre 8 gunthas. It was the case of the plaintiff that he was in possession of the same share in continuity with his existing land of 10 acres 30 gunthas and, therefore, the common property must be partitioned in such a way that he gets northern portion of the common property. This has been turned down by the Lower Appellate Court.

4. Admittedly, there was no documentary proof nor was there any oral evidence that was adduced before the trial court to show that the plaintiff was in possession of only the northern portion of the common land admeasuring 1 acre and 8 gunthas. Before the Lower Appellate Court the plaintiff relied upon the compromise pursis at Exh.32 and it was noted by the Lower Appellate Court that in Regular Civil Suit No.79

of 1979 the same was filed and was claimed to have been signed on 25/9/1980 i.e. during the pendency of the suit. The Lower Appellate Court noted that in RCS No.79 of 1979 an order of temporary injunction was passed in favour of the plaintiff and in the Misc. Civil Appeal filed against the said order, the compromise pursis was brought on record at Exh.33 and decree was passed accordingly. However, on the close scrutiny of the said document it was realised that it was signed only by defendant no.1 on 25/9/1980. A plea was raised before the Lower Appellate Court as well as the trial court that it was signed on behalf of all the defendants by defendant no.3 and, therefore, it ought to be accepted as a document binding on all of them. These contentions have been rejected by the Lower Appellate Court on examination of the said document and the statement made by the defendant no.3 in his deposition while in the witness box on 28/9/1994 i.e. after four years from the date the said compromise pursis was claimed to have been signed. Defendant No.3 while in the witness box categorically stated that he was deposing on behalf of defendant nos.2 to 8. Thus the defendant no.1 was not

party to the compromise pursis at Exh.32 and, therefore, the Lower Appellate Court rightly held that the said compromise pursis was signed by defendant no.3 for himself or for that matter by all the defendant nos.2 to 8. Even otherwise the map at Exh.23/2 does not even prima facie disclose that the plaintiff was in possession of the common 1/3rd share in the land admeasuring 1 acre 8 gunthas from the northern side so as to make his entire land holding in continuity. Based on the document i.e. partition deed at Exh.98 the Lower Appellate Court has rightly held that the plaintiff is the owner of agricultural land admeasuring 10 acres and 30 gunthas from Survey Nos.315 and 316 on the northern side and is entitled for 1/3rd share from the common land admeasuring 1 acre 8 gunthas, whereas the defendant nos.1 to 8 have 1/3rd and defendant nos.9 and 10 have remaining 1/3rd share in the said common land admeasuring 1 acre 8 gunthas. No fault could be found in the decree that has been granted by the Lower Appellate Court in favour of the plaintiff and there was no evidence before the courts below that the plaintiff was in possession of the 1/3rd share in common land on the

northern side only. On these obtaining circumstances, there is no substantial question of law that arises for considerations in this second appeal and the decree passed by the Lower Appellate Court is based purely on the fact finding exercise regarding the share and possession of the plaintiff on the suit property.

5. Hence this appeal fails at the threshold and the same is hereby dismissed.

(B.H. Marlapalle,J.)